

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
RAMON VALDEZ, et al., :
:
Plaintiffs, : 12-CV-1224 (NGG) (LB)
:
October 23, 2012
:
V. : Brooklyn, New York
:
SOMERSTEIN CATERERS OF :
LAWRENCE, INC. PENSION PLAN, :
et al., Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE LOIS BLOOM
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: GARY STONE, ESQ.
CHRISTOPHER DAGG, ESQ.

For the Defendant: JOHN GINSBERG, ESQ.
JUSTIN ALEX, ESQ.
WILLIAM GARRY, ESQ.

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1 THE CLERK: Civil cause for telephone
2 conference, docket number 12-CV-1224, Valdez, et al. v.
3 Somerstein Caterers of Lawrence, Inc. Pension Plan, et
4 al.

5 Will the parties please state your names for
6 the record? For plaintiffs?

7 MR. STONE: For plaintiffs, Gary Stone and
8 Christopher Dagg of South Brooklyn Legal Services, for
9 plaintiffs.

10 THE CLERK: And for defendants?

11 MR. GARRY: William J. Garry of Harris Beach
12 of the defendant H&R Convention and Catering.

13 THE CLERK: And for the Pension Benefit
14 Guaranty Corporation?

15 MR. GINSBERG: PBGC is not a party to this
16 action but for the Somerstein Caterers of Lawrence,
17 Inc. Pension Plan, from the PBGC as statutory trustee,
18 we have John Ginsberg and Justin Alex.

19 THE CLERK: Thank you. The Honorable Lois
20 Bloom presiding.

21 MR. STONE: I'm sorry, your Honor, there's
22 also someone else appearing.

23 MR. SOMERSTEIN: Stuart Somerstein.

24 THE CLERK: The Honorable Lois Bloom
25 presiding.

1 THE COURT: Okay, let me see if I have
2 everybody. Good morning, Mr. Stone, Mr. Gagg -- is
3 that your last name?

4 MR. GARRY: Garry, G-a-r-r-y.

5 THE COURT: No, the person that was with Mr.
6 Stone. I'm sorry, Mr. Garry, I have you separately.

7 MR. DAGG: My name is Chris Dagg, D-a-g-g.

8 THE COURT: D-a-g-g, thank you.

9 MR. DAGG: Correct.

10 THE COURT: Good morning, Mr. Garry, good
11 morning, Mr. Ginsberg and -- excuse me?

12 MR. GARRY: I'm sorry, your Honor, I was
13 telling someone to close the door.

14 THE COURT: Mr. Ginsberg, Mr. Alex, and for
15 the first time, we have with us one of the parties, Mr.
16 Somerstein?

17 MR. SOMERSTEIN: I'm not a party to this
18 action, your Honor. I was asked to call in.

19 THE COURT: I'm sorry, can you state your
20 full name for the record?

21 MR. SOMERSTEIN: Stuart Somerstein, S-o-m-e-
22 r-s-t-e-i-n.

23 THE COURT: Thank you, Mr. Somerstein. And
24 who asked you to call in?

25 MR. SOMERSTEIN: Mr. Stone sent me an e-mail

1 so I followed instructions.

2 MR. STONE: I have no memory of sending an
3 e-mail to Mr. Somerstein because I don't know his e-
4 mail address, but I certainly have no objection to him
5 being --

6 MR. SOMERSTEIN: I couldn't have called in
7 if you didn't give me the instructions.

8 THE COURT: Again, let's get to this. I'm
9 Magistrate Judge Bloom. I'm holding this conference
10 today.

11 At the last conference and as clarified in a
12 letter, the PBGC informed the Court that it anticipates
13 initiating estimated benefit payments for the
14 plaintiffs as well as other workers who were formerly
15 employed by Somerstein Caterers and Water's Edge in or
16 around October, 2012. That's ECF document number 20.

17 PBGC's formal determinations are made after
18 their actuaries and auditors complete their review.
19 That's stated in the letter. It's also stated that
20 plaintiff may appeal the determinations through the
21 PBGC appeals board. The Court stayed the matter to see
22 if the PBGC decision would affect, in essence moot out
23 the case. And the Court directed defendants to produce
24 to plaintiffs any plan documents and the contract of
25 sale and closing agreement by August 15th, 2012.

1 Since the last conference, plaintiffs
2 withdrew their claim against Jay Jadeja which is ECF
3 entry number 21. The parties filed a joint 25(f)
4 report, which provides that if the case continues
5 beyond today's conference, the parties expect to file
6 their dispositive pre-answer motions and the parties
7 will seek to postpone any discovery until after those
8 motions are adjudicated.

9 So as far as you, Mr. Somerstein, according
10 to the attorney for the private defendants, that's Mr.
11 Garry, H&R Convention and Catering and Quinn Restaurant
12 sued Mariana Somerstein, Stuart Somerstein and
13 Somerstein Caterers of Lawrence, Inc. and the SCL
14 Pension Plan for failing to put \$900,000 into the
15 pension plan, and that's pending in a separate case,
16 which is H&R Convention and Catering Corp. v.
17 Somerstein, 12-CV-1425. That's before Judge Weinstein
18 and Magistrate Judge Reyes, and that's an ERISA and
19 breach of contract case.

20 There is a pending motion for default in
21 that case against Mariana Somerstein. Stuart
22 Somerstein has answered in that case and the parties
23 were to meet for a settlement conference on October
24 12th, and if the case was not settled, to file a
25 proposed discovery schedule. The parties filed a

1 stipulation in that case voluntarily dismissing
2 plaintiff's claim that PBGC must assume responsibility
3 for the plan as moot. That's document ECF 60 in that
4 case.

5 So my questions here -- first, Mr. Stone or
6 Mr. Ginsberg, has PBGC issued the estimated benefits?

7 MR. GINSBERG: This is Mr. Ginsberg. I'm
8 going to let my colleague, Justin Alex, answer this.

9 THE COURT: Thank you, Mr. Alex.

10 MR. ALEX: Good morning, your Honor. I'll
11 address each of the three plaintiffs individually.
12 First, to Mr. Trujillo, PBGC has processed his benefit
13 application and will send him his first payment on
14 November 1st, 2012.

15 The second plaintiff, Mr. Valdez --

16 THE COURT: Wait, before we move off
17 Trujillo, he hasn't been notified of this or he has?

18 MR. ALEX: He has received notification of
19 his benefit amount.

20 THE COURT: Okay.

21 MR. ALEX: I'm not sure if he's been
22 notified that he'll receive his first payment on
23 November 1st.

24 THE COURT: Thank you.

25 MR. STONE: Your Honor, this is Gary Stone

1 speaking. I spoke to him -- Mr. Trujillo this morning,
2 and he said that he was told by telephone that he would
3 receive a check and he should expect it by November 7th.

4 THE COURT: Again, that it's going to be
5 processed by November 1st, I guess they're building in a
6 little time for the U.S. mail to deliver it. But he's
7 been given notice of the amount and he has been given
8 notice that it will start being paid on a monthly basis
9 November 1st, 2012. Is that correct, Mr. Stone?

10 MR. STONE: Correct.

11 THE COURT: Okay, continue on, Mr. Alex.

12 MR. ALEX: Now, Mr. Valdez's benefit
13 application is currently being processed. He asked for
14 a calculation of his joint and survivor annuity amount,
15 which PBGC is in the process of giving him. Once he
16 gets that, if he completes his application by November
17 9th, PBGC will be in a position to begin payments to him
18 on December 1st, 2012.

19 THE COURT: So, again, tell me what he must
20 complete?

21 MR. ALEX: Well, his application right now
22 is incomplete because he hasn't elected the form of
23 annuity, I guess you could put it, that he wants. He's
24 asked for a calculation of a joint and survivor annuity
25 with an option for his wife to receive a benefit, which

1 PBGC is currently working on.

2 THE COURT: But what is incomplete about the
3 application, the election?

4 MR. ALEX: Yes, your Honor.

5 THE COURT: Okay. And if he completes the
6 application by November 9th, you said?

7 MR. ALEX: Yes, your Honor, he will be in a
8 position to receive payments starting December 1st,
9 2012.

10 THE COURT: Okay. Mr. Stone, has Mr. Valdez
11 been made aware of what Mr. Alex is stating?

12 MR. STONE: Not exactly. We submitted an
13 application in which there was no box checked asserting
14 spousal election because the forms (ui), the absence of
15 an election, the form of benefit that Mr. Valdez wants
16 will take place. In other words, his wife, because of
17 the (ui), will automatically be provided a survivor
18 benefit. I was unaware of his need for any further
19 processing --

20 THE COURT: Well, now you've been made aware
21 and I'm hopeful that you'll get in touch with your
22 client. And I don't know the first thing about what he
23 was sent but I've been informed by Mr. Alex that if he
24 completes his form by November 9th, he'll start
25 receiving the benefits by 12/1.

1 MR. STONE: Representing Mr. Valdez, I will
2 say that he certainly does elect for his wife to
3 receive a joint and survivor annuity and he does not
4 waive the right.

5 THE COURT: But of course, an oral election
6 is not going to complete the form, Mr. Stone. Let's
7 not make this more complicated than it needs to be. If
8 you're disputing the amount, that's a different story.
9 But if Mr. Alex says that there needs to be something
10 on the form resubmitted by November 9th, how easy can
11 that be? Get your client to resubmit the form and then
12 he'll have his benefits by December 1st. Why should
13 we --

14 MR. STONE: Anything -- he will certainly
15 submit to expedite receipt of checks.

16 THE COURT: Well, that's exactly what I'm
17 saying, that if your client didn't bring this to your
18 attention, instead of fighting with Mr. Alex about
19 whether or not the law provides that it's automatic,
20 let's just get the form re-filled out and faxed over to
21 Mr. Alex's attention and get this done. Okay.

22 MR. STONE: My point, your Honor, is that
23 there was no point to delay any further. This is the
24 first I heard that there was a need to hold up -- hold
25 up the application --

1 THE COURT: Mr. Stone, Mr. Stone, Mr. Stone,
2 excuse me.

3 MR. STONE: I don't --

4 THE COURT: Mr. Stone, when we're on a phone
5 conference, you're going to have to take some verbal
6 cues. I can't speak over you. That doesn't do
7 anything for us. All I'm saying is, whether you knew
8 it or you didn't know it, let's get it done. And all
9 it involves is resubmitting a form, and you're going to
10 argue with me that there's no need to hold up the
11 benefit, when they just said as long as they get this
12 by November 9th, he'll get his payment by December 1st?
13 You think it could be done any quicker by you arguing
14 here?

15 As to Calderon, what's the status, Mr. Alex?

16 MR. ALEX: Yes, your Honor. Mr. Calderon is
17 the youngest plaintiff, and as I understand it, he has
18 not actually submitted an application for his benefits
19 yet. And until he does that, PBGC cannot proceed with
20 determining whether he's entitled to a benefit and if
21 so, how much that benefit is.

22 THE COURT: And he worked there five years
23 compared to the other two, who worked over twenty.

24 MR. ALEX: I'm not sure about that, your
25 Honor.

1 THE COURT: Mr. Stone, what's your position
2 with respect to Calderon?

3 MR. STONE: Mr. Calderon has not made an
4 application yet. He's not yet reached retirement age.
5 I will confer with him but last time I spoke to him, he
6 was ready to wait before applying for benefits. I will
7 speak with him and confirm that, just to be sure.

8 THE COURT: Okay. The effort here was to
9 see whether or not the determinations made by PBGC
10 would moot this case. So I know that you're going to
11 need to confer with your clients on that, Mr. Stone,
12 but that's what I wanted to address on today's
13 conference call.

14 Mr. Stone?

15 MR. STONE: Yes. Mr. Calderon -- there's
16 simply a misunderstanding. I believe Mr. Calderon
17 would not apply ordinarily, unless and until he was
18 ready to actually receive a benefit. The longer he
19 waits, the higher the monthly benefit will be.

20 THE COURT: I understand. What I'm saying
21 to you is, you have an action pending here on behalf of
22 three plaintiffs. You're suing Somerstein Caterers.
23 PBGC, as they said when they noted their appearance,
24 are not parties to the lawsuit, but they're the ones
25 that are looking to move to dismiss the case and to

1 stop any discovery.

2 You then have in Mr. Garry's clients, and
3 I'm not sure what Mr. Garry's clients are going to add
4 to the mix here. But, again, my interest is to see
5 what sort of deadlines I'm setting and how we're going
6 to proceed. I'm interested in Mr. Valdez, Mr. Trujillo
7 and Mr. Calderon being consulted so that they're not
8 agreeing to discontinue the case without them knowing
9 what that means for them.

10 As far as my notes from the prior case, I
11 was told that there were eighty, approximately eighty
12 plan participants. But right now, we have three named
13 plaintiffs. We have the defendants who I believe were
14 the subsequent purchasers, who are involved in another
15 lawsuit that's before Judge Weinstein.

16 And from what I've seen on the docket, those
17 cases were supposed to meet for settlement conference,
18 and if not, discovery would be scheduled, and that's
19 really of no moment here because it's really Valdez,
20 Trujillo and Calderon here, it's not the same H&R
21 Convention and Catering or Quinn people in this case.

22 So what do you want to do here, Mr. Stone,
23 and how long do you need to do it?

24 MR. STONE: There are two main issues. One
25 is simply getting the clients the benefits. I'm

1 actually very pleased that PBGC has moved forward on
2 the applications of Trujillo and Valdez. I'm
3 optimistic, actually, that within a couple of months,
4 they should both be receiving benefits.

5 THE COURT: Well, it's not a couple of
6 months. One is going to be December 1st and the other
7 is going to be November 1st. So that's not a couple of
8 months, that's like a couple of weeks on Mr. Trujillo.
9 And assuming that you're going to resubmit whatever Mr.
10 Alex has said was incomplete on the application, as
11 long as that's in by November 9th, they're saying he'll
12 receive the benefits December 1st. So I'm not going to
13 put this off a couple of months.

14 What I'm asking is, first of all, have
15 defendants produced the plan documents, the contract of
16 sale and the closing agreement?

17 MR. STONE: I have the -- yes, this is Gary
18 Stone speaking. We have the contract of sale and we
19 have all of those -- we have those documents. And we
20 have a document that is the pension plan. It's not
21 dated but I assume that it is the present benefit plan.

22 THE COURT: Well, the reason why I'm asking
23 that is because, quite frankly, to schedule the
24 defendant's motions and the PBGC response to the
25 private defendants' cross-claims sounds like a complete

1 waste of everybody's time here. If Mr. Trujillo is
2 going to get his benefits starting November 1st, and
3 that sounds like what's going to happen, and if Mr.
4 Valdez completes the application and gets it to PBGC by
5 November 9th and starts getting benefits 12/1, and you
6 acknowledge that Mr. Calderon is not of an age that
7 he's going to make an application at this time, well,
8 so what are we doing here?

9 MR. STONE: Well, first of all, I want to
10 make sure that my clients have check in hand. I also
11 want to make sure that Mr. Calderon does not want to
12 make an application for an early retirement benefit --

13 THE COURT: That's fine, that's fine. Mr.
14 Stone --

15 MR. STONE: And depending on what he says,
16 you know, confirm that one way or another with PBGC.
17 There's a separate cause of action specifically against
18 the administrator of the pension plan for penalties
19 under ERISA Section 502(c). That's 29 USC --

20 THE COURT: Who is the administrator?

21 MR. STONE: The administrator at present is
22 H&R --

23 MR. GARRY: That's not true, your Honor.

24 MR. GINSBERG: We needn't debate this
25 because whomever --

1 THE COURT: Can you please -- excuse me,
2 excuse me. Can you identify who's speaking because,
3 again, if we have to get this transcribed, I want it to
4 be clear.

5 MR. GINSBERG: I'm sorry, your Honor. This
6 is John Ginsberg for the Pension Benefit Guaranty
7 Corporation --

8 THE COURT: Thank you. I thought it was.
9 Go ahead.

10 MR. GINSBERG: -- as trustee of the pension
11 plan. There is no administrator of the pension plan.
12 PBGC, pursuant to ERISA, succeeds to all powers of the
13 administrator, but the pension plan has been
14 terminated. So we can debate who the administrator
15 was. That involves some legal technicalities and I
16 would submit to you that it's not necessary to this
17 action or at least to this discussion. Whatever
18 administrator we're talking about was the former
19 administrator prior to termination of the pension plan.

20 THE COURT: Let me make this easy. How
21 about we have -- excuse me. How about we have a
22 telephone conference on December 11th at 10:00 in the
23 morning. By that time, both Mr. Valdez and Mr.
24 Calderon should already have received a check in hand
25 -- I'm sorry, Mr. Valdez and Mr. Trujillo should

1 already have received a check in hand.

2 And I imagine once they start getting their
3 checks, they will continue receiving their checks. Is
4 that correct? This is for you, Mr. Alex or Mr.
5 Ginsberg.

6 MR. GINSBERG: I'm sorry, could you repeat
7 your question, your Honor?

8 THE COURT: Once they start getting their
9 benefit payments -- so you stated for the record that
10 Mr. Trujillo's was processed and will be paid November
11 1st, 2012. And if the application is completed by
12 Valdez, he will receive benefits starting on December
13 1st, 2012. And I said, and they will continue to
14 receive benefit payments, correct?

15 MR. GINSBERG: That is correct.

16 THE COURT: So why don't we put this on for
17 a phone conference on December 11th, and I'm going to
18 tell you a phone number to call into, which is a court
19 conference line with a password, and I'll put this out
20 in an order by ECF. Is everybody available at 10:00?

21 And I don't think we need you, Mr. Stuart
22 Somerstein. So everybody except Mr. Stuart Somerstein,
23 meaning somebody on behalf of the plaintiffs, whether
24 it's Mr. Dagg or Mr. Stone, Mr. Garry, and Mr. Ginsberg
25 and Mr. Alex, one or both of you. Is everybody

1 available December 11th at 10:00?

2 MR. GARRY: William Garry, yes.

3 MR. STONE: The plaintiffs are ready, that's
4 fine.

5 MR. GINSBERG: And PBGC is also available,
6 your Honor.

7 THE COURT: Okay, very good. So I'm putting
8 this over for a conference. I'm asking you, Mr. Stone,
9 to meet with your clients, to get whatever it is
10 necessary so that Mr. Valdez starts getting his
11 benefits, they're saying by November 9th.

12 We do have Mr. Alex on the line, so if
13 there's any confusion about what needs to be
14 resubmitted before you get off the line or call him
15 right back. Make sure you know. Get Mr. Valdez into
16 your office, discuss the matter with Mr. Calderon,
17 about whether he's going to apply for any benefits or
18 not.

19 Again, by that time, either we're going to
20 say the case is going to be resolved or we're going to
21 schedule the defendants' motions. That's what we're
22 going to do at the next conference, okay?

23 I am giving this amount of time
24 understanding, Mr. Stone, that you want your clients to
25 have the check in hand. And I'm giving you until the

1 11th because even if the payment is started on 12/1, it
2 should be in hand by the 11th. So speak to your client
3 at least the day before to make sure. Then if there's
4 anything that I'm missing, you can alert me before the
5 conference.

6 If you could send me -- if there's anything
7 that's going to change what I'm expecting to happen,
8 which is either the case is going to be discontinued or
9 I'm going to be scheduling the defendants, who have
10 asked to make motions -- I'm scheduling that motion at
11 the next conference. If there's anything else that's
12 different, feel free to give me a letter to tell me
13 what's different by December 6th.

14 Likewise, Mr. Stone, if everybody has the
15 check in hand and you don't think we need the telephone
16 conference and you're going to discontinue the action,
17 you could just contact the defendants' counsel and say
18 that you're going to stipulate to discontinue the case.
19 And as long as I get that letter by the end of the
20 prior week, I'll cancel the telephone conference on the
21 11th, okay?

22 So I'm writing down the Valdez v. Somerstein
23 Caterers is adjourned until December 11th at 10:00 by
24 telephone. I'm going to give you the phone number now
25 but I'll put it in the order, just to make sure that

1 you have it. It's a conference call line. It's 718-
2 403-5340. You need to press the access code, which is
3 983, and then the pound sign, and then it will ask you
4 for a pass code. That will be 2170 and, again, the
5 pound sign.

6 So I'll expect the two defendants -- well,
7 Mr. Garry on behalf of the Sing/H&R Convention
8 defendants, and on behalf of Somerstein Caterers, not a
9 party but the PBGC attorneys, as well as Mr. Stone to
10 all call into that line and be on at 10:00 on December
11 11th.

12 Is there anything else that needs to be
13 addressed on behalf of plaintiffs, Mr. Stone?

14 MR. STONE: No, your Honor.

15 THE COURT: Is there anything further that
16 needs to be addressed on behalf of the Somerstein
17 Caterers, who are no longer in business but it is the
18 Pension Benefit Guaranty Corporation who has appeared?
19 Mr. Ginsberg or Mr. Alex, anything further?

20 MR. GINSBERG: No, your Honor.

21 THE COURT: Anything further on behalf of
22 the H&R Convention/Sing defendants, Mr. Garry?

23 MR. GARRY: No, your Honor.

24 THE COURT: Then I'll look forward to
25 hearing from all of you that the case has reached a

1 conclusion, and if not, we'll deal with the next events
2 on December 11th at 10:00 a.m.

3 Thank you very much. Good luck to
4 everybody. Thank you.

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I certify that the foregoing is a correct
transcript from the electronic sound recording of the
proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read 'E. Barron', with a long horizontal stroke extending to the right.

ELIZABETH BARRON

October 25, 2012